**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**KIMBERLY CORL, Personal Representative of the ESTATE OF BRADLEY SCOTT CORL, deceased.**

**Plaintiff-Appellee,**

**SC: 150970**
**Ct. of Appeals Case No. 319004**
**Tuscola County Case No. 11-026733-NI**
**Hon. Amy Grace Gierhart**

**v.**

**RAILAMERICA, INC., and HURON AND EASTERN RAILWAY COMPANY, INC.**

**Defendants-Appellants.**

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## PLAINTIFF'S SUPPLEMENTAL REGARDING DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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## JURISDICTIONAL STATEMENT

Plaintiff/Appellee denies that Defendants/Appellants' Application demonstrates grounds for granting leave under MCR 7.302(B). There is not a "substantial question" as to the validity of a legislative act. MCL 462.317 simply does not say what Defendants/Appellants would like to say, i.e. that it erases the common law duty of Michigan railroads to maintain safe track, and eliminate visual obstructions. Neither does the issue involve legal principles of major significance to the state's jurisprudence. The Court of Appeals did not overrule *Paddock v. Tuscola & Saginaw Bay Railway Co.*, 225 Mich App 526; 571 NW2d 564 (1997); it simply observed that its holding was that a railroad has no duty to petition a road authority to take action under MCR 462.317.

## COUNTER STATEMENT OF QUESTIONS INVOLVED

I. Whether the Court of Appeals decision herein conflicts with *Paddock v. Tuscola & Saginaw Bay Ry. Co.*, 225 Mich App 526; 571 NW2d 564 (1997) or with MCL 462.317.

The Court of Appeals says: NO.

Defendants-Appellants say: YES.

Plaintiff-Appellee says: NO.

II. Was Paddock v. Saginaw Bay Ry. Co., supra, correctly decided?

The Court of Appeals says: YES.

Defendants-Appellants say: YES.

Plaintiff-Appellee say: YES.

## STANDARD OF REVIEW

An Application for Leave to Appeal to the Michigan Supreme Court is governed by the grounds stated in MCR 7.302(B).

**PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL**

## I. Counter Statement of Facts.

While mindful of the Court's directive to not repeat matter from the prior briefs regarding Defendants Appellants' (hereinafter simply "Appellants") Application herein, Plaintiff Appellee (hereinafter simply "Plaintiff") submits its counter statement of fact for the most part unchanged, except to emphasize the inferences which Appellants' graft onto decedent's conduct (looking down the tracks to his right) just prior to losing his life in the rail crossing accident which is the subject of this litigation.

This fatal truck/train collision occurred on the morning of September 29, 2009. Bradley Scott Corl was southbound on Lobdell Road in Mayville, Michigan, driving a flatbed truck owned by his employer, Hoppes Lumber. A Huron & Eastern locomotive, HESR 3866, traveling light, was eastbound, long hood forward (i.e. train traveling backwards), so that only engineer Russell Page could see Corl as he approached the crossing from the north.

Appended hereto as Ex. 1 is a diagram of the crossing, along with a Google Earth view, which demonstrates the extreme, approximate 40 degree angle made by Lobdell Road and the Huron & Eastern track to the west, i.e. the northwest quadrant of the crossing. Further, from the Google photo it is evident that the northwest quadrant is a wooded hillside. The engineer, who testified he was familiar with the crossing, confirmed that the crossing angle of the northwest quadrant was "roughly" 45 degrees and that there was a hillside on the northwest quadrant.

Q Now, this is a rather extreme angle of the crossing; correct?

A Yes.
Q Probably 45 degrees, roughly?
A Roughly.
Q Okay. And are you familiar with the rise in ground in this area (indicating), in the northwest quadrant of the crossing?
A Yes.
Q There's like a hillside almost-----
A Right.

Deposition of Russell Page, pp. 24-25, appended hereto as Ex. 2.

It is precisely this combination of topography, foliage and the extreme angle of the crossing that render it treacherous for a southbound motorist facing an eastbound train. The affidavit of William D. Berg, Professor Emeritus of Civil and Environmental Engineering at the University of Wisconsin, and one of the nation's premier crossing experts, is appended hereto as Ex. 3. Dr. Berg opines, based on his viewing the crossing, his examination of the speed tapes, photos, and testimony to date, that the "severe angle" of the crossing, the foliage and the configuration of the track, prevented decedent from seeing the train when he stopped at the stop line north of the crossing. Further, in Dr. Berg's opinion, the train did not become visible to Corl until he had proceeded south from the stop line one second prior to impact, affording him no time for evasive action. Dr. Berg states the railroad's available counter-measures would have included posting a flagman at the crossing, realigning the road at a 90 degree angle, closing the road, or installing warning devices, at least flashers, at the intersection.

There was a car stopped at the south side of the crossing, driven by Willis Johnson, with his wife Loretta, in the passenger seat. Johnson told officers that he observed Corl approach the crossing. He said he flashed his lights at Corl and saw the truck come to a stop at the crossing. He then claimed to have observed Corl lean forward "as if to pick something from the floor of

the said vehicle." See Police Report appended hereto as Ex. 4. Then the truck proceeded forward into the path of the oncoming train.

Russell Page, the engineer, also testified that he saw decedent "bent over, like he was getting something off the floor…" but this testimony has to be discounted as inherently incredible, given the distance Page was from the decedent's vehicle and the towering height of the locomotive. See Ex. 2, p. 14 Dep. Of Russell Page.

Q All right. Now what makes you think the fellow was bending over to pick something up?
A I---I seen him laying, like he was reaching, laying down getting something off the floor or something, like something fell or maybe---I don't know what he was doing, but he was ---he was leaning over to the passenger side of the vehicle.
Q So you could see through the truck windows, you could see him, what laying over to the right side of the seat?
A Yes.
Q Like he's trying to look down the tracks?
A. No. He was laying down across the seat like he was picking something up off the floor or something. I'm not for sure if he was picking something off the floor or what he was doing, but he was laying towards that way.
Q And you're at this point several hundred feet away from him?
A Maybe a hundred feet, maybe.
Q And you could see through the truck window, and you could clearly see him reaching to his right?
A Yes.

The Appellants' evidently knew they had a problem with Page's testimony because they resisted discovery of the crew interviews conducted by their investigator in the immediate wake of the accident. On June 7, 2013, the trial court, pursuant to Plaintiff's Motion to Compel, ordered that the notes of the crew interviews be produced. Attached as Ex. 5 hereto are the notes of Appellants' investigator's interview with Page who makes no mention of decedent bending over to the right as if to pick something up off the floor.

Matt Denome, the conductor, testified that he spoke with Willis Johnson and his wife, Loretta, at the scene and that he remembered Willis Johnson saying that decedent "was bending

down to pick something up," Ex. 6, Depos. of Matt Denome, p. 15. Denome incorporated this detail in the Company accident report, "But witness headed northbound said he was trying to pick something up on floor." Ex. 7. One must assume that Page would have mentioned this detail when first interviewed by the company claim investigator; his failure to do so indicates he adopted the Johnson's observation as his own when Denome questioned the couple at the scene.

The decedent's action, in bending over to the right, as if laying over the right seat, is consistent with the behavior of a driver confronted with an extreme crossing angle to his right, i.e. an attempt to see further up the track to the west. Dr. Berg notes in his affidavit that Corl, in his normal seated position in the Hoppes truck at the stop mark, could see up the track to the west only 45 to 60 feet. See para. 8 of Berg Affidavit, Ex. 3 hereto. Leaning to the right, according to Dr. Berg, increased decedent's view up track to 114 feet. This is a more likely explanation of decedent's conduct in the last few moments of his life than the speculation offered by Defendant, i.e. that someone who had the presence of mind to stop at the crossing would bend over in the cab to pick something up off the floor instead of looking down the track for the approaching train.

As Dr. Berg notes in his affidavit, that as Corl proceeded south from the stop mark, the train would have been visible to him for just one second before impact, allowing no time for an evasive response.

## II. ARGUMENT

### A. Whether the Court of Appeals decision herein conflicts with Paddock v. Tuscola & Saginaw Bay Ry. Co., 225 Mich. App. 526; 571 N.W.2d 564 (1997) ; 571 NW2d 564 (1997) or with MCL 462.317.

The Court of Appeals held in *Paddock v. Tuscola & Saginaw Bay Railway Co.*, 225 Mich App 526; 571 NW2d 564 (1997) with regard to MCL 462.317 that a railroad has no duty to *petition* the road authority to establish a clear vision area at a rail crossing. The Court of Appeals herein, at page 4 of its decision, correctly cited *Paddock's* holding, "…this Court held railroads do not have a duty to petition the governmental authority to take corrective action."

*Paddock* did not intimate, let alone hold, that the railroad's common law duties to maintain a safe crossing, including the duty to maintain safe lines of sight and to remove obstructions, including vegetation, were in any way affected by MCL 462.317. The Court of Appeals herein noted that

> …defendants assert that this Court held that a railroad has no duty to act with respect to vegetation in the absence of an order from the appropriate road authority to create a clear vision area. However a careful reading of this Court's language shows that this Court has not held that a railroad has no duty to remove vegetation. Instead, this Court held railroads do not have a duty to petition the governmental authority to take corrective action. Thus, although defendants essentially ask this Court to extend the holding in *Paddock* to state that a railroad has no duty to create a clear vision area, nothing in the plain language of MCL 462.317 supports such an extension.

The use of the phrase "clear vision area" in the final sentence is not helpful as it appears in the Railroad Code only in MCL 462.317 and is nowhere defined. As the Court of Appeals notes herein at p. 4, the duty to remove sight obstructions, including vegetation, has long been included in a railroad's common law duty to provide a safe crossing, e.g. *Bauman v. Grand Trunk Western Railroad Company*, 376 Mich. 675, 687; 138 N.W.2d 285 (1965). The question

of whether a railroad has a duty to create a clear vision under MCL 462.317 area differs from a railroad's long-standing common law duty to remove obstructions, including vegetation, that interfere with a motorist's line-of-sight. As the Court of Appeals observed in *Cryderman v. Soo Line Railroad Co.*, 78 Mich. App. 465, 475; 260 N.W.2d 135 (1977); with regard to the predecessor statute to MCL 462.317, "Within that statutory framework, parties entering into such agreements are empowered to purchase and remove visual instructions which lie within clear vision areas."

MCL 462.317(1) provides:

> Sec. 317. (1) If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority.
> (2) The acquisition of right-of-way, purchase and removal of obstructions within a clear vision area, including buildings and other artificial constructions, trees, brush, and other growths, and grading or earthwork, and including the maintenance of such conditions, shall be at the equal cost and expense of the railroad and road authority.
> (3) For public, farm, bicycle, pedestrian, or other private crossings of the railroad tracks of a high speed rail corridor, state, federal, and other funds may be expended in accordance with section 301(4) for construction of access roads, purchase of real estate, purchase of private crossing easements, compensation for crossing closure, utility relocation, costs associated with improvements to traffic control devices, grade crossing closures, relocations, consolidations, and separations.

The references to "acquisition of right-of-way," "purchase and removal of obstructions…including buildings and other artificial obstructions…and grading and earthwork…" imply a much grander scope than the duty to remove visual obstructions. The reference to the "purchase of real estate, purchase of private crossing easements…utility relocation…grade crossing closures, relocations, consolidations and separations" indicate this statute was intended to provide a remedy to obstructions which are outside of the railroad right-

of-way and off the traveled portion of the roadway. Unfortunately, the legislature offers no definition of a "clear vision area" and we are left to surmise.

It has been held, with regard to a previous version of MCL 462.317, that neither railroad nor road commission had any obligation to create a "clear vision area." The Court of Appeals in *Cryderman v. Soo Line Railroad Co., supra,* at 78 Mich. App. 475, approved a jury instruction noting that the predecessor statute, MCL 469.6,[1] did not impose a mandatory obligation on the part of either railroad or public highway to enter into clear vision agreements.

> MCLA 469.6; MSA 22.766 and MCLA 469.7; MSA 22.767 provide a procedure for the elimination of visual obstructions through the entry and implementation of "clear vision area" agreements between railroad companies and public highway authorities having jurisdiction and control over roads intersected by railroad tracks. Within that statutory framework, parties entering such agreements are empowered to purchase and remove visual obstructions which lie within the clear vision areas. The purpose is to make railroad crossings safer. **The procedure does not impose a mandatory obligation on the part of railroad and public highway authorities to enter such agreements. (*emphasis added*).**
>
> 78 Mich App at 475

Oddly, *Cryderman* also approved an instruction permitting the jury to consider the road commission's failure to enter into a "clear vision area" agreement with the railroad as constituting a breach of duty owed plaintiffs, 78 Mich App at 475. That holding was overturned by the Supreme Court in *Scheurman et al v. Michigan Dept of Transportation et al*, 434 Mich. 619, 634; 456 N.W.2d 66 (1990); which held the road commission's duties extended only to the traveled portion of the roadway. Thus, *per Paddock*, the railroad has no duty under MCL

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[1] **Sec. 6.** Whenever the railroad company or railroad companies and the public authorities having jurisdiction over such highway shall so agree in writing in connection with the establishment of a new crossing, or the improvement of an existing crossing, that portion of the right of way and property owned and controlled by either highway or railroad authorities within the limiting area to be provided for clear vision as hereinafter described, shall be considered as dedicated to the joint usage of both highway and railroad improvements, and without charge to either party. The portion of property so included shall be maintained for clear vision, and the spotting of cars on railroad tracks, parking of automobiles on the highway, construction of buildings, signs and/or other obstructions of vision, and the growth of weeds, brush or similar obstructions shall be prohibited, controlled and maintained to such an extent as may be reasonably practicable.

462.317 to petition the road commission to undertake a clear vision area and arguably, the statute imposes no duty on either railroad or road authority to enter into such agreements.

Thus, the holding by the Court of Appeals herein is consistent with *Paddock*. It goes further than *Paddock* needed to go, in holding that the common law cause of action for failure to maintain a safe crossing, including the obligation to remove sight obstructions, remains in place and is not affected by MCL 462.317.

The Court of Appeals herein noted at p. 5 of its opinion, that the failure of MCL 462.317 to note what affect, if any, it has on the common law differs markedly from MCL 257.668(2) which specifically eliminated previous common law causes of action for failure to provide proper crossing signage in the absence of an administrative order requiring same:

> The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, **shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities. (*emphasis added).***

The Court of Appeals herein stated, "[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 494 Mich. 194, 217; 801 N.W.2d 35 (2011).

Furthermore, the Court of Appeals decision herein is in complete accord with *Paddock* in holding that plaintiff's claim that the railroad should have flagged the crossing is pre-empted by federal law, page 3 of the Court's decision.

Thus, there is no conflict between the Court of Appeal's decision in *Paddock* and its decision herein.

**B. Paddock, While An Extension Of Federal Speed Pre-Emption, That Has Not Been Widely Followed, Provides No Grounds For Reversal.**

In the early nineties, in the wake of the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658; 113 S.Ct. 1732; 123 L.Ed. 387 (1993); the concept of federal pre-emption entered the field of railroad litigation like an invasive species. *Easterwood* held that state law tort claims based on train speed were preempted by federal law, specifically the Federal Railroad Safety Act, 49 U.S.C. Section 20101. The High Court declined to address whether the preemption of speed claims barred "a suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." Id. at 675, footnote 15. Most of the case law attempting to define what the High Court meant by "specific, individual hazard" are federal district court decisions. *Paddock* cited several of them, e.g. *Bowman v. Norfolk S. Ry.*, 832 F. Supp. 1014 (D.S.C. 1993), *Wright v. Ill. Cent. R.R.*, 868 F. Supp. 183 (S.D. Miss. 1994), *Armstrong v. Atchison, T. & S.F. Ry., 844* F. Supp. 1152 (W.D. Tex. 1994). The gist of these decisions is that "specific, individual hazard" refers to avoidance of a specific collision and not to the dangers posed by a particular grade crossing. The Sixth Circuit, however, has not defined a "specific, individualized hazard," but it has stated that the purpose of the exception is "to keep local control over local issues, that is issues that are unique to the particular site." *Ludwig v. Norfolk & S. Ry., 50* F. App'x 743, 748 (6th Cir. 2002).

In the wake of *Easterwood*, *supra*, the Holy Grail for the railroad defense litigator became a finding that all claims were federally pre-empted and *Paddock* accomplished that with

its holding that if a railroad is in compliance with federal speed limits, federal preemption becomes operative and a locomotive cannot be compelled to slow as it approaches a crossing, no matter how dangerous, and took that notion farther than ever before, holding "...if a train cannot be compelled to slow down as it approaches a crossing, it also cannot be compelled to stop altogether in order to deploy a flagman," 225 Mich App at 530. This part of the *Paddock* decision has not been followed except in unpublished decisions; the Court of Appeals subsequently denied publication to a similar holding in *Martinez v. Conrail*, 2001 WL 1654958 (Mich. Ct. App. 12-21-01). A federal district court decision in *Garza v. Norfolk S. Ry.*, No. 3:09CV2045, 2012 U.S. Dist. LEXIS 123011 (N.D. Ohio July 23, 2012) cited *Paddock* for the proposition that where there was no "specific individual hazard," there was no duty to deploy a flagman. It is also unpublished. (copies appended).

Subsequent cases have bolstered the basis for the *Paddock* holding regarding the pre-emption of the flagman claim. *O'Bannon et al v. Union Pacific RR Co et al*, 960 F. Supp. 1411 (W.D. Missouri 1997), (specific, individual hazards do not encompass claims of inadequate warning devices, grade/angle of crossing, proximity of highway), *aff'd.* 169 F.3d 1088 (1999), *Petre v. Norfolk Southern Railway Co.*, 458 F. Supp. 2d 518 (N.D. Ohio 2006) and *Ludwig v. Norfolk Southern Railway Co., supra,* have established that the term, "specific, individual hazard" means "not a hazard common to all crossings—it cannot be one that is statewide in character, and cannot be capable of being addressed within uniform, national standards." *O'Bannon, supra*, at 1420-1421. Further, while *Ludwig* declined to define the term, the plaintiff there was attempting to use "extra hazardous" crossing factors to assert that the crossing was excepted from federal preemption as a "specific, individual hazard." After reviewing cases from district court cases, the Sixth Circuit noted that that such a claim "relates uniquely to the

avoidance of a single specific collision." *Id.* At 747-48. It has been consistently emphasized that the kinds of conditions that that could constitute a "specific, individual hazard" are limited to transient conditions that could lead to an imminent collision such as a child standing on the tracks or a motorist stranded on a crossing. 458 F. Supp at 530.

Thus, it appears that the flagman ruling in *Paddock* appears to rest on firm ground.

The other aspect of *Paddock*, its apparent conflation of the so-called "clear vision area" statute with the long standing common law duty on the part of the railroads to remove visual obstructions to a motorist's line of sight was due not to a deliberate holding by the court but by and error in the way Plaintiff pled the case.

> Plaintiff's complaint alleged that the crossing was "extra hazardous" and that "vegetation at the accident site obstructed the view" of motorists. The complaint further alleged both negligence and gross negligence, including the railroad's failure to (1) maintain a proper lookout at the crossing and (2) warn the public of the hazard, as well as the road commission's failure to (1) warn the public of the hazard, (2) clear the obstructing vegetation, and (3) paint appropriate pavement markings at the crossing. The trial court granted summary disposition with regard to each of these claims. 225 Mich App at 529.

Plaintiff's error was in not alleging a line-of-sight obstruction claim against the railroad, and instead basing her vegetation/line of sight claim on the so-called clear vision statute, directed against the road commission. Perhaps her counsel was encouraged by the ruling in *Cryderman*, supra, 78 Mich. App. at 475 which upheld an instruction that the jury could consider the failure of the Road Commission to enter into a clear vision area as a breach of a duty owed to Plaintiff. Unfortunately that portion of the *Cryderman* holding had been overruled by this Court's holding in *Scheurman*, 434 Mich. at 633-34*; 456 NW2d 66 (1990).*

*Paddock's hold*ing that railroads have no duty to petition the road commissions to establish a clear vision area was supported by *Turner v. CSX Transp.*, 198 Mich. App. 254, 256-57 (1993); 497 NW 2d 571 (1993) and appears to be unassailable. It confirms that neither

railroad nor road commission have any duties under MCL 462.317, and that the statute is a non-entity until railroad and road commission agree to establish such a zone. At most it is a cost sharing measure.

Thus, *Paddock* should not be reversed.

### C. Appellants Selective Reference's to Dr. Berg's Testimony in other Matters Give a False Impression.

Appellants reference in their Reply Brief three cases where Dr. Berg's testimony was found not to create a question of fact for the jury, and makes no reference to cases where his testimony was relied upon to create a question of fact. *Choate v. Ind. Harbor Belt R.R.*, 954 N.E.2d 760, 781-84 (Ill. App. Ct. 2011), *Brown v. Conrail*, No. E-90-35, 1991 Ohio App. LEXIS 4847 (Ohio Ct. App. Oct. 11, 1991), *Wightman v. CONRAIL*, 86 Ohio St. 3d 431, 437-38 (1999), *Grand Trunk R.R. v. Cothern*, 1995 Ohio App. LEXIS 923 (1995).

## III. Summary.

Leave to appeal should be denied. The Court of Appeals did not overrule *Paddock*, simply distinguished it. Paddock should not be reversed. Further, the physical facts of the accident are in dispute rendering Defendant's reliance of the so-called "physical facts rule," inappropriate. Plaintiff's widow should be permitted to present her case to the jury. Defendant's attempts to erase the common law duty owed to the citizens of Michigan by the state's railroads

to maintain safe crossings, free from visual obstruction, should be vain attempts. These specious arguments should no longer delay justice for an aggrieved widow and her fatherless children.

Respectfully submitted,

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